

SERVED: December 29, 2005

NTSB Order No. EA-5199

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of December, 2005

APPLICATION OF)
MICHAEL ANTHONY TARASCIO)
) Docket 314-EAJA-SE-17176
)
For an award of attorney)
fees and expenses under the)
Equal Access to Justice Act)
)
)

OPINION AND ORDER

The Administrator has appealed from the Equal Access to Justice Act (EAJA) initial decision of Administrative Law Judge William R. Mullins, served on February 10, 2005.¹ The law judge approved applicant's EAJA application, and ordered the payment of the \$21,978.47 requested in fees. The Administrator argues that decision, and argues that her complaint against applicant

¹ A copy of the law judge's initial decision is attached.

was substantially justified, and that awarding attorney's fees under EAJA is consequently inappropriate. The Administrator also argues that applicant's attorney's fees are excessive, and should be reduced by 20 percent. We deny the Administrator's appeal.

On August 10, 2004, the Administrator issued an Emergency Order seeking revocation of applicant's Airline Transport Pilot (ATP) and Airframe & Powerplant (A&P) certificates. In the Emergency Order, the Administrator alleged that applicant had directed his employees not to log mechanical discrepancies or irregularities between January 2002 and March 2004. As a result, the Administrator alleged that applicant had violated 14 C.F.R. § 43.12(a).² In addition, the Administrator's complaint

² Section 43.12(a) prohibits the falsification of maintenance records:

§ 43.12 *Maintenance records: Falsification, reproduction, or alteration.*

(a) No person may make or cause to be made:

(1) Any fraudulent or intentionally false entry in any record or report that is required to be made, kept, or used to show compliance with any requirement under this part;

(2) Any reproduction, for fraudulent purpose, of any record or report under this part; or

(3) Any alteration, for fraudulent purpose, of any record or report under this part.

included allegations that applicant had violated 14 C.F.R. §§ 91.13(a)³ and 91.7(a).⁴

Upon reviewing the evidence, the law judge dismissed the Administrator's complaint, finding that, although entries regarding mechanical problems or irregularities were not present in the mechanical records, applicant did not *falsify* any entries. Therefore, the law judge found that charging applicant with a § 43.12(a) violation was inaccurate. The law judge also dismissed the Administrator's § 91.13(a) and § 91.7(a) charges, due to the stale complaint rule.⁵ We affirmed the law judge's

³ Section 91.13(a) states that no person may operate an aircraft in a, "careless or reckless manner so as to endanger the life or property of another."

⁴ Section 91.7(a) states that, "[n]o person may operate a civil aircraft unless it is in an airworthy condition."

⁵ Rule 33 of our rules of practice, codified at 49 C.F.R. § 821.33, provides that, where a complaint states allegations of offenses that occurred more than 6 months prior to the Administrator's advising the respondent of her reasons for her proposed action, the respondent may move to dismiss the allegations as "stale." Where the complaint does not allege a lack of qualification of the respondent, the Administrator must show good cause for her delay. *Id.* § 821.33(a). Alternatively, where the complaint does allege a lack of qualification of the respondent, the law judge must determine whether qualification would be an issue if all the allegations, stale and timely, are assumed to be true. *Id.* § 821.33(b).

In the underlying case, we upheld the law judge's dismissal of the § 91.13(a) and § 91.7(a) charges as stale because the Administrator did not present an issue regarding qualification; therefore, the law judge was free to consider whether the Administrator had taken more than 6 months to bring the airworthiness and carelessness charges.

decision. Administrator v. Tarascio, NTSB Order No. EA-5116 (2004).

Under EAJA,⁶ we will award certain attorney's fees and other specified costs when, among other things, the government is shown not to have been substantially justified in pursuing its complaint. 5 U.S.C. § 504(a)(1); Application of Smith, NTSB Order No. EA-3648 at 2 (1992). The Supreme Court has defined the term "substantially justified" to mean that the government must show that its position is reasonable in fact and law. Pierce v. Underwood, 487 U.S. 552, 565 (1988); see also Application of U.S. Jet, Inc., NTSB Order No. EA-3817 (1993). Such a determination of reasonableness involves an initial assessment of whether sufficient, reliable evidence exists to pursue the matter. Catskill Airways, Inc., 4 NTSB 799, 800 (1983) (stating that Congress intended EAJA awards to dissuade the government from pursuing "weak or tenuous" cases).

We have previously recognized that EAJA's substantial justification test is less demanding than the Administrator's burden of proof when arguing the merits of the underlying complaint. U.S. Jet, supra, at 1 (citing Administrator v. Pando, NTSB Order No. EA-2868 (1989)). In Federal Election

⁶ Equal Access to Justice Act, 5 U.S.C. § 504; see also 49 C.F.R. pt. 826.

Commission v. Rose, 806 F.2d 1081 (D.C. Cir. 1986), the D.C. Circuit stated that the merits phase of a case is separate and distinct from the EAJA phase. As such, we are compelled to engage in an independent evaluation of the circumstances that led to the Administrator's original complaint, and determine whether the Administrator was substantially justified in pursuing the case based on those circumstances. Id. at 1087.

In the case at hand, the Administrator presents a jumbled series of arguments, most of which are nearly identical to her arguments on the merits of the case. First, the Administrator argues that the law judge made a credibility determination in reaching his decision, therefore rendering attorney's fees inappropriate.⁷ The Administrator, however, lists no examples of such credibility determinations, but merely offers the wholesale statement that, "there were key factual issues in dispute that could only be resolved through a credibility determination by the law judge." Administrator's Brief at 10-11. Our review of the record shows that the law judge decided the § 43.12(a)

⁷ "[W]hen key factual issues hinge on witness credibility, the Administrator is substantially justified - absent some additional dispositive evidence - in proceeding to a hearing where credibility judgments can be made." Application of Fuller, NTSB Order No. 285-EAJA-SE-16202 at 7 (2005); see also Administrator v. Caruso, NTSB Order No. EA-4165 (1994); Administrator v. Conahan, NTSB Order No. EA-4276 (1994); Administrator v. Martin, NTSB Order No. EA-4280 (1994).

charge on the basis that the facts simply did not coincide with the charge, and that the law judge decided the §§ 91.13(a) and 91.7(a) charges on the basis of the stale complaint rule. Such conclusions did not require any credibility determinations.

Furthermore, the Administrator argues that she was substantially justified in attempting to invoke the doctrine of collateral estoppel to prove that applicant had violated §§ 43.12(a), 91.13(a) and 91.7(a). The Administrator bases her argument of collateral estoppel on our conclusion that applicant's company, Air East Management, Ltd., had violated several provisions of the Federal Aviation Regulations, including §§ 91.13(a) and 91.7(a). Administrator v. Air East Management, Ltd., NTSB Order No. EA-5089 (2004). The Administrator contends that, because both cases "stem from the same nucleus of facts," collateral estoppel precludes the conclusion that applicant did not violate §§ 91.13(a) and 91.7(a). This argument, however, does not pass muster, primarily because the Administrator never charged Air East with a § 43.12(a) violation. We recognized this in our Opinion and Order on the merits, Administrator v. Tarascio, NTSB Order No. EA-5116 at 3 (2004). In addition, the law judge recognized at the beginning of the hearing that the issues in the Tarascio case were not the same as those in the Air East case.

Transcript (Tr.) 7. The Administrator's counsel even acknowledged that Air East did not contain a § 43.12(a) charge: "[w]hen I made that [motion for summary judgment], I realized that there was no previous charge of 43.12 in the prior case against Air East." Tr. 10. Such an overt admission precludes the Administrator from arguing that she was substantially justified in raising an argument of collateral estoppel.

The Administrator also argues that she was justified in bringing the §§ 91.13(a) and 91.7(a) charges because the stale complaint rule should not apply. Other than quoting the stale complaint rule, the Administrator does not present any support for the argument that her complaint against applicant presented a qualification issue.⁸ In the underlying Tarascio case, we held that the Administrator's allegation of falsification was not legitimate; therefore, the Administrator has not adequately raised an issue regarding applicant's qualifications.

Finally, the Administrator's appeal summarizes the allegations of the underlying case, and outlines the testimony from the administrative hearing. Such a summary is not helpful for this appeal. Despite our holding in Administrator v.

⁸ Title 49 C.F.R. § 821.33 provides that, where a lack of qualification is at issue, the law judge must determine whether qualification would be an issue if all the allegations, stale and timely, are assumed to be true. See n.5, supra.

Alvarez, 5 NTSB 1906 (1987), that a failure to make a maintenance entry would not support a § 43.12(a) charge, the Administrator does not provide evidence that her pursuit of the § 43.12(a) was substantially justified. In response to Alvarez, the Administrator merely argues that Alvarez can be distinguished from the case at hand because the facts are different. The Administrator does not state which facts are distinguishable, and does not explain why it would have been reasonable for her to believe that the Alvarez principle should not be applied here.

Overall, we found in Administrator v. Tarascio, NTSB Order No. EA-5116 (2004), that the, "allegation of false entries was unsustainable on its face," and that, "no issue of lack of qualification was presented." Id. at 3. Therefore, when we reviewed the law judge's decision on the merits, we recognized that the Administrator's charges were not substantially justified. The Administrator's appeal of the law judge's EAJA award does nothing to alter this conclusion.

Further, the law judge authorized a total award of \$21,978.47, based on an hourly rate of \$152. Applicant's attorney's time and expenses in defending against the Administrator's original complaint are well documented. See, e.g., Applicant's Exhibit A. Fees for work performed in 2004

are capped at \$156/hour. See 49 C.F.R. 826.6.⁹ Therefore, the law judge's award reflects this limitation and is appropriate. Although the Administrator argues that applicant's attorney's fees should be reduced by 20 percent, the Administrator does not identify any specific charges on any of applicant's invoices as erroneous or even questionable, and we do not find applicant's request to be unreasonable. Therefore, we will decline to reduce the law judge's award by 20 percent.

Applicant has also submitted a supplemental request for fees and expenses incurred in this EAJA action. In light of our finding that the Administrator's charges were not substantially justified, we will grant applicant's supplemental request.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's decision is affirmed; and
3. The Administrator is ordered to pay the applicant a total of \$24,380.52.

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS and HERSMAN, Members of the Board, concurred in the above opinion and order.

⁹ The Consumer Price Index for 2004 was 188.9.